No. 80-251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,

Appellant,

v.

ROBERT L. GOLDBERG, *et al.*,

Appellees.

BRIEF OF *AMICI CURIAE*, CONGRESSMAN LAWRENCE P. McDONALD, CONGRESSMAN NEWT GINGRICH, CONGRESSMAN JOHN M. ASHBROOK, SENATOR JAKE GARN, SENATOR ORRIN G. HATCH, AND THE WASHINGTON LEGAL FOUNDATION.

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INTERESTS OF *AMICI*

Congressman Lawrence P. McDonald is a United States Representative from the 7th District of the State of Georgia.

Congressman John M. Ashbrook is a United States Representative from the 17th District of the State of Ohio.

Congressman Newt Gingrich is a United States Representative from the 6th District of the State of Georgia.

Senator Jake Garn is a United States Senator from the State of Utah.

Senator Orrin G. Hatch is a United States Senator from the State of Utah.

The United States Senators and Congressmen seek to file an *amicus* brief in this suit because it raises vital issues of great interest, among which is whether Section 3 of the Military Selective Service Act, which authorizes draft registration of male citizens only, is constitutional. The Senators and Congressmen seek to protect their constitutional prerogatives under Art. I, Section 8, including Congress' power to establish and maintain the United States armed forces.

This case is of fundamental importance, concerning as it does, the defense and security of our country and its citizens. As duly elected representatives of the citizens of their respective districts and states, the *amici* seek also to advance and protect the interests of their constituents to be able to live securely in a United States that has a strong national defense and a military that is prepared to meet military emergencies, enemy aggression, and threats to world peace.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae*. Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in the following cases: *Williams v. Zbaraz*, 100 S. Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 100 S. Ct. 2326 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Federal Trade Commission v. Standard Oil Co. of California*, 49 U.S.L.W. 4054 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, No. 79-678 (filed Aug. 22, 1980); *FCC v. WNCN Listeners Guild*, Nos. 79-824, 79-825, 79-826, 79-827, (U.S., filed Nov. 26, 1979).

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in this case are primarily concerned with the end results of this lawsuit. WLF's concern in this case is to present to the Court aspects of the public interest not presently represented.

The Washington Legal Foundation finds that selective service registration of males only is a constitutional exercise to raise and support armies pursuant to Article I, Section 8 of the Constitution and that public interest and policy considerations dictate that registration of males only is appropriate.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the statement of the facts in the appellant's Jurisdictional Statement ("Jurisdictional Statement") at 1-7.

SUMMARY OF ARGUMENT

This case involves the constitutionality of sections 453 and 454(a) of the Military Selective Service Act providing for selective service registration of males only. 50 U.S.C. App. §§453,454(a). The three-judge district court below struck down the statutes ruling that registration which excluded women was a violation of equal protection as embodied in the Due Process Clause of the fifth amendment. Jurisdictional Statement at App. 43a.

Amici maintain that the selective service registration of males only is a constitutional exercise of Congressional prerogative to raise and support armies pursuant to Article I, Section 8 of the Constitution. Furthermore, the three-judge district court erred in applying the "important governmental interest" test to this case which involves military preparedness and national security—areas in which the less strict "rational basis" test is the proper measure to determine the constitutionality of a statute.

Even assuming, *arguendo*, that the Act is judged under the more stringent measure of important governmental interests, *amici* submit that the Act passes constitutional muster. Congress' determination to implement registration of only males furthers the vitally important governmental purpose of ensuring military preparedness and securing the national defense. The Courts should not substitute their judgment for that of Congress in determining the manner in which to provide for the national

defense. Congress has acted within its constitutionally delegated powers and therefore this Court must rule that registration of males only is valid.

ARGUMENT

I.

THE SELECTIVE SERVICE REGISTRATION OF MALES ONLY IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL PREROGATIVE TO RAISE AND SUPPORT ARMIES PURSUANT TO ARTICLE I, SECTION 8 OF THE CONSTITUTION.

In the present case plaintiffs challenge the constitutionality of the selective service registration of males only, as provided for in the Military Selective Service Act. 50 U.S.C. App. §§453, 454(a). Plaintiffs argue that their rights to equal protection of the laws, as embodied in the Due Process Clause of the fifth amendment, are violated in that only males are subject to registration for the draft. Jurisdictional Statement at 6. Plaintiffs claim that they are harmed by this gender classification and that it cannot be justified under applicable standards of constitutional review. Jurisdictional Statement at 5,6.

A. The proper standard of judicial review in analyzing cases involving military preparedness is the reasonable basis test and the selective service registration of males only passes scrutiny under that test.

The Supreme Court has established three standards of review which may be applied in analyzing a discriminatory classification under the Equal Protection Clause and the fifth amendment to the Constitution. The first test requires that statutory classifications based on sex must bear a reasonable relationship to a permissible governmental purpose. *See Schlesinger v. Ballard*, 419 U.S. 498

(1975). The second test determines that a statutory classification based on sex is unconstitutional unless it is substantially related to an important governmental interest. *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973). The third test finds that "suspect" classifications such as those based on race, religion, or other fundamental rights will be held unconstitutional unless they are related to a compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

The three-judge district court below properly found that the third test requiring a compelling state interest is not applicable and that a gender based classification does not trigger the highest level of scrutiny. Jurisdictional Statement at App. 16a.

The three-judge district court did determine that the intermediate test requiring an important governmental interest was applicable and found there was no important governmental interest to justify the exclusion of women from registration. Jurisdictional Statement at App. 22a. The Court erred in its determination by failing to make the distinction between cases involving monetary compensation and cases involving military preparedness and national defense. The three-judge district court simply found that every case involving a gender-based classification automatically triggers the important governmental interest test.

Amici submit, however, that the proper standard of review in analyzing the selective service registration of males only and other cases involving military preparedness and national security is the rational basis test. This test requires that a statutory classification based on sex need only bear a reasonable relationship to a permissible governmental purpose. Further, *amici* maintain that ap-

plication of the rational basis test demonstrates that male only registration is constitutional.

Article I, Section 8 of the U.S. Constitution commits exclusively to Congress the powers to "raise and support Armies," "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval forces." U.S. Const. art. I §8, cls. 12-14. This power exists in peacetime as well as war. *Bertelsen v. Cooney*, 213 F.2d 275, 277 (5th Cir.), *cert. denied* 348 U.S. 856 (1954). The power is plenary. Thus, it is not for the judiciary to review legislative branch determinations as to what military strength is necessary for the safety of our nation or how such strength is to be raised or composed. *Id.* at 277; *United States v. Macintosh,* 283 U.S. 605 (1930).

Congress may exercise this plenary authority in all areas in which it has substantive legislative jurisdiction as long as the exercise of that authority does not offend some other constitutional provision or fundamental right. *See United States v. Ballin,* 144 U.S. 1, 5 (1892); *Buckley v. Valeo*, 424 U.S. 1 (1974). This is the only limitation on Congress' delegated constitutional authority.

This court has historically shown great deference to Congress' authority to raise and support armies under Article I, Section 8 of the Constitution and has emphasized that the responsibility for determining how best our armed forces shall fight or be ready to fight rests with Congress and not with the courts. *Schlesinger v. Ballard,* 419 U.S. 498, 510 (1975); *Toth v. Quarles,* 350 U.S. 11, 17 (1955).

In *Schlesinger v. Ballard*, 419 U.S. 498 (1975) the Court upheld the constitutionality of a statutory scheme which at that time treated men and women naval officers

differently for the purposes of promotion. In reaching its decision, the Court stated:

> This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise' . . . The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, *see* U.S. Const., Art. I. Section 8, cls. 12-14, and with the President. See U.S. Const., Art. II, Section 2, cl. 1. We cannot say that, in exercising its broad constitutional power here, Congress has violated the Due Process Clause of the fifth amendment.

Id. at 510.

In *Ballard* the Court recognized the great deference which must be given Congress when raising armies and providing for the defense of our nation. *Id.* at 510. The Court looked only to whether the different treatment of men and women was rational in relation to national defense needs and military preparedness. *Id.* at 508, 509.

The problems faced by Congress in determining whether to draft men but not women, as in other instances involving national defense needs and military preparedness, are altogether different than the policy considerations which led to the laws and regulations reviewed in cases like *Frontiero v. Richardson*, 411 U.S. 677 (1973), *Reed v. Reed*, 401 U.S. 71 (1971), and *Craig v. Boren*, 429 U.S. 190 (1976).

In *Reed v. Reed*, 401 U.S. 71 (1971) the Court held unconstitutional a statute preferring men over women in the appointment of administrators of estates. The Court found that the sole purpose for the statute was administrative convenience and held that this would not justify disparate treatment under the Constitution.

In *Frontiero v. Richardson*, 411 U.S. 677 (1973) the Court held unconstitutional a statute which provided that for the purpose of obtaining increased quarters allowances and medical and dental benefits, a serviceman may claim his wife as a dependent whether or not she actually is dependent, while a servicewoman may not claim her husband as a dependent unless she actually proves he is dependent. The Court, in a plurality opinion, found this disparity of treatment constitutionally invalid, stating:

> [A]ny statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience . . . involves the very kind of arbitrary legislative choice forbidden by the [Constitution].

Id. at 76, 77.

In both *Reed* and *Frontiero* the statutes in question failed constitutional scrutiny because they did not advance an important governmental interest. In addition, these cases did not involve military preparedness and there was no explanation or justification for the differences in treatment.

In *Craig v. Boren*, 429 U.S. 190 (1976) plaintiffs challenged an Ohio statute prohibiting the sale of beer to males under the age of 21 and females under the age of 18 as a violation of equal protection. The Supreme Court, in a plurality opinion, struck down the statute stating, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

The distinguishing characteristic between the cases employing the important governmental interest test, such as *Craig v. Boren, Id.*, and those employing the rational basis test is that the former cases involved questions of

financial compensation while the latter cases presented questions of military preparedness. This distinction is very important considering the deference shown Congress in cases involving use of Article I, Section 8 power to raise armies and prepare for national emergencies.

Accordingly, in *Campbell v. Beaughler,* 519 F.2d 1307 (9th Cir. 1975) the Ninth Circuit upheld a Marine Corps regulation prescribing different rules for men and women with regard to hair length and wigs. The Court, applying a rational basis test, found that a prohibition of the use of wigs for men was rationally related to safety in combat and that the disparate treatment of men and women was reasonable because women do not serve in combat. The Court specifically noted that "the military has a right to govern its affairs without . . . intervention from the judiciary." *Id.* at 1309.

In *United States v. Reiser*, 532 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976), the United States appealed from an order of the U.S. District Court dismissing the indictment of the defendant for failing to submit to induction into the armed forces. The Court of Appeals held that the Military Selective Service Act did not deny due process or equal protection because it subjected men, but not women, to registration and induction into the armed forces, since there is a clear rational relationship between the government's legitimate interests and classification by sex.

Accordingly, in the present case the standard to be applied is a rational basis test because the question of selective service registration for males only arises in the context of military preparedness. Here, the all-male registration is certainly reasonably related to the purpose of raising a combat-ready and effective and efficient armed service. *See Falbo v. United States,* 320 U.S. 549, 554

(1944). In addition, it is not challenged that women do not serve in combat-ready roles, so that there is ample justification for making a distinction in the context of military preparedness.

In *Gillette v. United States*, 401 U.S. 437 (1971), one appellant objected to participation in the Vietnam War because of pacifist convictions, the other because he thought the Vietnam War was an unjust war under Catholic doctrine. Neither appellant would refuse to serve in wars he considered wars of national defense. *Id.* at 440. The Supreme Court recognized that it was well within the power of Congress to distinguish between those who object to only particular wars on the basis of religious or pacifist convictions and those who object to all wars on the basis of religious or pacifist beliefs.

The *Gillette* case demonstrates the deference shown Congress when exercising its power pursuant to Article I, Section 8. The distinction based on religious beliefs for military necessity clearly parallels the distinction based on sex in the present case. Congress has determined that for the purpose of military preparedness it is necessary to institute registration of males only at this time. Pursuant to the rule in *Gillette* that decision must be upheld.

The Supreme Court has applied a rational basis standard in several first amendment cases arising in the military context. The all-male selective service registration is consistent with and analogous to these cases. In *Greer v. Spock*, 424 U.S. 828 (1976), the Supreme Court upheld a ban on speech and demonstrations on military bases which would have been permissible in civilian life. The Court recognized that the primary function of the military is to fight and be ready to fight and noted the "special constitutional function of the military in our national life." *Id.* at 837.

In the recent case of *Brown v. Glines*, 100 S.Ct. 594 (1980) the Court upheld regulations requiring Air Force personnel to obtain approval from commanders before circulating petitions on the base against a challenge that the regulations were a violation of first amendment rights. The Court did not require the government to demonstrate a compelling interest which would have been required in a civilian setting. But rather, the Court approved of the regulations as "reasonably necessary" for discipline, moral, and military effectiveness. *Id.* at 600.

Hence, the courts have traditionally and consistently shown great deference to Congress when reviewing legislation enacted pursuant to Article I, Section 8 of the Constitution. This deference, taken together with case law confronting the issue of military preparedness requires that a rational basis test be applied to determine the constitutionality of the selective service registration of males only. When applying the rational basis test it is clear that the all-male registration is reasonably related to the governmental purpose of establishing an effective and efficient combat-ready army.

It is also important to emphasize that it is not proper for the Court to substitute its judgment for that of the Congress when reviewing decisions involving the raising of armies pursuant to Article I, Section 8 of the Constitution. The Constitution has expressly delegated this power to Congress and any action by the Court to rule the registration of males only invalid will be an impermissible usurpation of that power.

Since, as we demonstrate below, the all-male registration passes muster under the more stringent important governmental interest test, it certainly survives scrutiny under the rational basis test.

B. Assuming *arguendo*, that the district court was correct in employing the more stringent test of "important governmental interest," the registration of males only passes scrutiny under that test.

The selective service registration of males only is constitutional, even assuming *arguendo* that the Act is judged under the more stringent standard applicable to analysis of gender-based discrimination in non-military contexts.

A primary purpose of the Military Selective Service Act is to "insure the security of this Nation." 50 U.S.C. §451(b). Congress is expressly empowered by Article I, Section 8 of the Constitution "to declare war." U.S. Const. art I §8, cl. 11. This power "necessarily connotes the plenary power to wage war with all the force necessary to make it effective; and 'to raise . . . armies,' which necessarily connotes the like power to say who shall serve in them and in what way." *United States v. Macintosh*, 283 U.S. 605, 622 (1930). It is crucial to the security of this nation to be able to mobilize "national manpower in the shortest practical period" with maximum effectiveness. *Falbo v. United States*, 320 U.S. 549, 554 (1944). It is the primary business of our armies "to fight and to be ready to fight." *Greer v. Spock*, 424 U.S. 828 (1976); *Toth v. Quarles*, 350 U.S. 11 (1955). The Courts have consistently recognized the importance of a strong national defense. *See United States v. Macintosh*, 283 U.S. 605 (1930); *Falbo v. United States*, 320 U.S. 549 (1944); *Toth v. Quarles*, 350 U.S. 11 (1955).

When Congress decided to reinstitute registration it was done, in part, in response to the Soviet invasion of Afghanistan. Jurisdictional Statement at 3. At that time

the President and Congress determined that male only registration was necessary to preserve and enhance our national security interests. Congress determined that it was vitally necessary to initiate registration but determined that it was not proper to register women at that time. *Id.* at 4. Congress based its decision, in part, on the Report of the Subcommittee on Manpower and Personnel on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act. *See* 94 Cong. Rec. S6531 (daily ed. June 10, 1980) (remarks of Sen. Warner). The Subcommittee found that while women play an important role in the military, it would not be in national defense and security interests to register women at that time. 94 Cong. Rec. S6531 (daily ed. June 10, 1980) (Report of the Subcommittee on Manpower and Personnel of Senate Armed Services Committee). The Subcommittee determined that women should not register and men should because of current manpower shortages, and the need to rotate personnel from non-combat to combat positions. *Id.* at S6532.

The determination to implement the selective service registration of males only was done to further the vitally important government purpose of ensuring military preparedness and securing the national defense by organizing military forces in the most efficient and effective manner. This action of Congress would certainly pass scrutiny even under the more stringent test of "important governmental interest" as set forth in *Craig v. Boren*, 429 U.S. 190 (1976).

Three distinguished law professors from Yale University Law School recently sent a letter to Senator Sam Nunn concerning the constitutionality of registration for males only, stating:

A Congressional decision to conscript men but not women would be upheld under the most severe and suspicious version of the constitutional test. The issue is rooted in the nature of the problem of organizing military forces capable of victory under contemporary circumstances. The case for conscripting men only would overcome any burden of proof, however phrased.

* * * * *

If the Constitution should be interpreted to require Congress to treat men and women alike in the draft, Congress would have to draft far more women than it needs to staff non-combat jobs in the military. As a result, the equal drafting of men and women would cause great and unnecessary disruption to no purpose that could not be served better by the enlistment of women in appropriate numbers for non-combat service.

* * * * *

We can see no constitutional obstacle to the proposition that Congress may enact laws providing for the conscription of men for military service without conscripting women. The conflicting interests Congress must balance in making this fundamental judgment cannot be compared to those at issue in cases dealing with gender based discrimination in welfare systems, the administration of estates, establishing the age at which people may drink liquor in public, or the other controversies which have been litigated.

94 Cong. Rec. S6533 (daily ed. June 10, 1980) (Letter to Sen. Sam Nunn from Joseph W. Bishop, Jr., Robert H. Bork, and Eugene V. Rostow, Professors of Law, Yale University Law School).

The above quotations emphasize the importance and special significance of Congress' power in the area of national defense. The determination which Congress made was based on contemporary military needs and requirements in order to be militarily prepared for any national emergency. It is certainly in the best interests of all citizens that Congress be permitted to carry out the duties expressly delegated to it by the Constitution in order to ensure the safety of this nation.

As a matter of public policy this Court must reverse the three-judge district court. If this Court affirms the lower court decision there will be very serious and detrimental ramifications. The Court would then be faced with such questions as whether women and men must be drafted in equal numbers and whether women must be placed in combat roles. The judiciary would be in the position of directing how our armed forces should prepare for national defense. This is contrary to the express intent of the Constitution and clearly not in the best interests of our national security.

CONCLUSION

The Constitution has delegated Congress the power to raise armies. U.S. Const. art. I, §8, cl. 12. This Court should not substitute its judgment for that of Congress in determining the manner in which to provide for the national defense. The public interest demands that the citizens of this country be able to live securely in a United States which has a strong national defense and armed forces prepared to meet military emergencies, enemy aggression, and threats to world peace. Congress has determined that in the important interests of national defense the selective service registration of males only is

appropriate at this time. *Amici* urge this court to uphold the selective service registration of males only as a constitutional exercise of Congress' Article I, Section 8 powers.

Respectfully submitted,

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